Supreme Court of the United States

October Term, 1972

NO. 72-844

E. E. FALK, INDIVIDUALLY AND AS PARTNER IN DRUCKER & FALK, ET ALS.,

Petitioners,

v.

PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE PETITIONERS

JONES, BLECHMAN, WOLTZ & KELLY
Franklin O. Blechman
Herbert V. Kelly
E. D. David
2600 Washington Avenue
Newport News, Virginia 23607

Counsel for Petitioners

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
QUESTIONS PRESENTED	4
STATEMENT OF THE CASE	5
INTRODUCTION AND SUMMARY OF ARGUMENT	9
ARGUMENT:	
I. Petitioners Are Not An Enterprise Since The Specified Gross Annual Volume Of Sales Made Or Business Done Is Measured By Gross Commissions, Not Gross Rentals.	11
II. The Maintenance Workers Employed At The Various Apartment Projects Managed By The Petitioners Are Employees Of The Owner, Not Of Drucker & Falk.	15
A. The Result Of The Conclusion Which The Government Urges Would Be To Overrule *Maryland* v. *Wirtz*, Disregard The Congressional Intent Of Not Extending The FLSA To Small Local Businesses, Sanction Fleeting Coverage And Turn On Its Head The Axiom That An Agent Can Rise No Higher Than Its Principal.	15
B. Petitioners, As An Agent, Do Not Act As An *Employer In Relation To An Employee*, Within The Meaning Of Section 3(d).	18
C. The Maintenance Employees Are Employees Of And Employed By The Project Owners And Are Not Employed By Drucker & Falk In Its Enterprise Within The Meaning Of Sections 6(b) And 7(a)(2).	20
D. As A Matter Of Economic Reality The Maintenance Workers Are Employees Of The Project Owner, Not Drucker & Falk.	21
CONCLUSION	25

TABLE OF CITATIONS

Cases	Page
Arnheim and Neely, Inc. v. Hodgson, 444 F.2d 609 (3rd Cir. 1971)	13
Asselta v. 149 Madison Avenue Corp., 65 F.Supp. 385 (S.D.N.Y. 1945) aff'd 156 F.2d 134 (2nd Cir. 1946)	24
Bartels v. Birmingham, 332 U.S. 126 (1947)	10, 22
Greenberg v. Arsenal Bldg. Corp., 50 F.Supp. 700 (S.D.N.Y. 1943) aff'd 144 F.2d 292 (2nd Cir. 1944), rev'd in part on other grounds sub nom Brooklyn Bank v. O'Neill, 324 U.S. 697 (1945)	24
Hodgson v. Royal Crown Bottling Co., Inc., 324 F.Supp. 342 (N.D. Miss. 1970)	21
Illinois Tri-Seal Products, Inc. v. United States, 353 F.2d 216 (Ct. Cl. 1965)	23
Maddox v. Jones, 42 F.Supp. 35 (N.D. Ala. 1941)	21
Maryland v. Wirtz, 392 U.S. 183 (1968)	16, 17
McComb v. Homeworkers' Handicraft Corp., 176 F.2d 633 (4th Cir. 1949)	24
McComb v. McKay, 164 F.2d 40 (8th Cir. 1947)	19, 21
Mitchell v. Carratt, 160 F.Supp. 261 (S.D. Fla. 1956)	13
Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947)	21
Schmidt v. Randall, 160 F.Supp. 228 (D. Minn. 1958)	12, 13
Shultz v. Falk, 312 F.Supp. 608 (E.D. Va. 1970)	15
Shultz v. Isaac T. Cook & Co., 314 F.Supp. 461 (E.D. Mo. 1970)	13, 21
Southern Ry. Co. v. Black, 127 F.2d 280 (4th Cir. 1942)	24
United States v. Rosenwasser, 323 U.S. 360 (1945)	21
United States v. Silk, 331 U.S. 704 (1947)	21
Walling v. Portland Terminal Co., 330 U.S. 148 (1947)	20, 21
Williams v. Jacksonville Terminal Co., 315 U.S. 386 (1940)	21

Page

Wirtz v. Columbian Mutual Life Ins. Co., 380 F.2d 903 (6th Cir. 1967) 13

Wirtz v. First National Bank and Trust Co., 365 F.2d 641 (10th Cir. 1966) 13

Wirtz v. Jernigan, 405 F.2d 155 (5th Cir. 1968) 13

Wirtz v. Savannah Bank & Trust Co., 362 F.2d 857 (5th Cir. 1966 13

Statutes

Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201 et seq.

Section 3(d), 29 U.S.C. 203(d) 2, 18
Section 3(e), 29 U.S.C. 203(e) 2
Section 3(g), 29 U.S.C. 203(g) 2
Section 3(k), 29 U.S.C. 203(k) 2, 11
Section 3(s), 29 U.S.C. 203(s) 3, 11
Section 6(b), 29 U.S.C. 206(b) 3, 20
Section 7(a)(2), 29 U.S.C. 207(a)(2) 4, 20

Miscellaneous

Senate Report No. 145, 89th Cong., 2nd Sess. 1961 U.S. Code Cong. & Ad. News 12

House Report No. 871, 89th Cong. 1st Sess. 17

House Report No. 1366, 89th Cong., 2nd Sess. 17

Senate Report No. 1487, 2 U.S. Cong. and Ad. News (1966) 12, 17, 24

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DAVID C. FALK, INDIVIDUALLY AND AS PARTNER IN DRUCKER & FALK, AND
R. E. SMITH, INDIVIDUALLY AND AS PARTNER IN DRUCKER AND FALK,

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

Supreme Court. Certiorari was denied in *Falk* v. *Hodgson,* 404 U.S. 827 (1971) (App. C., Petition for Certiorari, p. 11). Certiorari was granted in *Falk* v. *Brennan,* ..... U.S. ....., 35 L. Ed. 2d 686 (1973) (App. 65).

Fourth Circuit. The first opinion of the United States Court of Appeals for the Fourth District is reported at 439 F.2d 340 (1971) (App. D., Petition for Certiorari, pp. 12-28), and the most recent opinion is reported 69 LC ¶ 32,759 (1972) (App. A., Petition for Certiorari, pp. 1-2).

District Court. The initial opinion of the United States District Court for the Eastern District of Virginia is reported in 312 F. Supp. 608 (E.D. Va. 1970) (App. E., Petition for Certiorari, pp. 29-40), and the second opinion is reported at 69 LC Par ¶ 32,758 (1972) (App. B., Petition for Certiorari, pp. 3-10).

JURISDICTION

The judgment of the Court of Appeals was entered on September 11, 1972. A timely Petition for a Writ of Certiorari was filed on December 8, 1972, and the petition was granted on February 26, 1973. The jurisdiction of the Court rests upon 28 U.S.C. 1254 (1).

STATUES INVOLVED

The appropriate sections of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *e. seq.*, read in pertinent part as follows:

> Sec. 3 (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee. . . . (29 U.S.C. 203 (d))
>
> Sec. 3 (e) "Employee" includes any individual employed by an employer. . . . (29 U.S.C. 203 (a))
>
> Sec. 3 (g) "Employ" includes to suffer or permit to work. 29 U.S.C. 203 (g))
>
> Sec. 3 (k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition. (29 U.S.C. 203 (k))

Sec. 3 (r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor:. . . . (29 U.S.C. 203 (r))

Sec. 3 (s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling or otherwise working on goods that have been moved in or produce for commerce by any person, and which—

(1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) . . . (29 U.S.C. 203 (s).)

Sec. 6 (b) Every employer shall pay to each of his employees (other than an employee to whom subsection (a) (5) applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this Act by the Fair Labor Standards Amendments of 1966, wages at the following rates:

(1) not less than $1 an hour during the first year from the effective date of such amendments,

(2) not less than $1.15 an hour during the second year from such date,

(3) not less than $1.30 an hour during the third year from such date,

(4) not less than $1.45 an hour during the fourth year from such date, and

(5) not less than $1.60 an hour thereafter. (29 U.S.C. 206 (b))

Sec. 7 (a) (2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this Act by the Fair Labor Standards Amendments of 1966—

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed. (29 U.S.C. 207 (a) (2))

QUESTIONS PRESENTED

I. Under the Fair Labor Standards Act to be covered by an enterprise must have an annual gross volume of sales made or business done of $500,000. Is this figure to be measured by the gross rentals collected by the agent or by that agent's gross commissions?

II. Are maintenance workers employed at the buildings managed by petitioners employees of the apartment owner or of the petitioners?

STATEMENT OF THE CASE

This action was instituted by the Secretary of Labor on January 30, 1969, under Section 17 of Fair Labor Standards Act of 1938, against the defendants who are partners in the real estate management firm, Drucker & Falk. The activity of Drucker & Falk which is the catalyst for this case is its real estate agency relationship to owners of various apartment complexes within the State of Virginia.

Drucker & Falk's agency relationship is defined by written contract.[1] Under this contract Drucker & Falk had two main obligations. The first was to lease and collect the rents for the apartment projects. As to this aspect the contracts varied in that they may call for Drucker & Falk to furnish the employees for this service and bear that cost[2] or they may call for Drucker & Falk to merely supervise the personnel supplied by the owners, the owners bearing the cost.[3] Where Drucker & Falk bore the cost of the clerical help, these employees were paid as Drucker & Falk employees and are, therefore, not involved in this suit. In the situation where the owners of the project paid the clerical help, the employees were not paid overtime.

The other main obligation of Drucker & Falk was to supervise the operation and maintenance of the property within the budget set by the owners, the entire cost to be borne by the owners.[4] Since the employees were deemed to be those of the owners, they were not paid overtime.

In its capacity as agent for the owner, Drucker & Falk, with minor variations from project to project, carry out the maintenance of the apartment projects through a fairly

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[1] App. 34, 40. Sample contracts are at App. 50-57 and 58-64.

[2] App. 40, 58-59.

[3] App. 40, 51.

[4] App. 53 and 60-61.

autonomous Project Manager.[6] It is this individual, carried on the payrolls as an employee of the project,[7] who has the capacity to make normal day-to-day decisions and to do the day-to-day physical operation, maintenance, repair and upkeep of the project.[8] He is expected to make appropriate decisions as to the necessity for painting, redecorating and the extent of repair or replacement of damaged equipment.[9]

The average pay of the Project Manager is $125 per week with apartment and utilities furnished in addition to the weekly salary.[9] He is in charge of each project and hires, fires and supervises the maintenance employees of the project.[10] The Project Manager keeps the records of hours worked each week by the maintenance employees and submits the records directly to defendants central office where the payroll for the project is made up for the account of each owner.[11]

The project Manager submits a semi-annual budget request to the Area Manager and higher supervisory officials in Drucker & Falk's organization.[12] Defendants' officials review and revise the budget and present it, with their recommendation, to the project owner for approval.[13] The mainte-

[6] App. 45.

[7] App. 44. This is also true of the maintenance employees he supervises.

[8] App. 44.

[9] App. 44.

[10] App. 44.

[11] App. 44. Each employee of the project is paid on Drucker & Falk's checks from a special payroll account, (App. 44), which is an in and out account funded by the owner's rentals which have been collected. (App. 34, 44) Goods & services ordered by the project manager are paid by Drucker & Falk in a similar manner. (App. 45).

[12] App. 45.

[13] App. 45.

nance superintendent does not normally discuss the formal budget with the owner.[14] However, the owner normally inspects the property on at least a semi-annual basis and discusses the project needs with the maintenance superintendent.[15] This inspection is normally conducted just prior to the presentation of the budget request for the following period.[16] The budget as it is approved by the owner is sent to the maintenance superintendent by the Area Manager or other Drucker & Falk officials.[17] Generally, the budget places specific allowances for maintenance costs such as payroll, painting, grounds maintenance, plumbing, equipment repair, appliance replacement, etc.[18] Within the limits of the budget the Project Manager sets the hours of work and wage rates of the maintenance employees.[19] The Area Managers and higher supervisory officials in defendants' organization have, but rarely exercise, a veto over the decision of the Project Managers with respect to hiring, firing and setting wage rates.[20]

The Project Managers are in a position to know, but may not know, who the owners of the project are.[21] Most of the Project Managers know who the owners are and know that their wages are ultimately paid by the owner out of the rents for the project.[22] While they may talk to the owners oc-

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[14] App. 45.
[15] App. 45.
[16] App. 45.
[17] App. 45.
[18] App. 45.
[19] App. 45.
[20] App. 45.
[21] App. 46.
[22] App. 46.

casionally about the projects, the Project Managers look to Drucker & Falk for supervision and direction.[23]

Occasionally, but only rarely, Drucker & Falk has transferred maintenance personnel from one project to another; in each case this was done with the knowledge and approval of the owners.[24] Except in certain cases of a small project,[25] all employees work solely at the project where they are employed.[26]

The collection of rentals, the operation of the rental office, the dealing with tenant complaints and the maintenance of office records is normally done by Drucker & Falk employees.[27] As to these people, there is no dispute since they are carried on Drucker & Falk's payroll and were paid in accordance with the FLSA. At approximately seven projects the agency contracts call for Drucker & Falk to supervise this personnel as agents for the owners.[28]

As compensation for its services, the owners pay to Drucker & Falk a fixed percentage of the rentals collected.[29] With one exception, in no apartment project managed by

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[23] App. 46. This supervision and direction is supplied to the Project Manager through the Executive Director of the Management Department of Drucker & Falk, his assistant and/or the Area Manager. Drucker & Falk employs six area managers who are responsible for supervising a number of projects within a given area. (App. 43) All these individuals are on Drucker & Falk's payroll and not involved in this suit. (App. 43).

[24] App. 46.

[25] For those projects with no central facility there is a shared labor understanding where one maintenance man may work on two projects. He he is paid by two checks, one from each project. (App. 47).

[26] App. 48.

[27] App. 50.

[28] App. 50.

[29] Normally 4% when the rental office personnel are supplied by the owner. (App. 51, 55) and 6% when those people are supplied by Drucker & Falk. (App. 59, 62).

Drucker & Falk are the rentals greater than the statutory minimum, though if lumped togther they are substantially in excess.[20] Nor will the statutory minimum be met either by calculation of the individual commissions paid by each project to Drucker & Falk or by combining all those commissions together.[21]

It was this failure of the owners to pay overtime in the above situations which led to the institution of this suit against Drucker & Falk. Suit was not filed against the separate owners because it is admitted that the Fair Labor Standards Act did not reach to any one individual project owner. The only way the employees of the various projects managed by Drucker & Falk could come under the Fair Labor Standards Act is by virtue of the government's theory, i.e., Drucker & Falk is the employer of the project employees and that Drucker & Falk is an enterprise engaged in commerce. The District Court held that the employees were not those of Drucker & Falk and further, that the proper measure for enterprise coverage was gross commissions. The Fourth Circuit thought otherwise and reversed.

SUMMARY OF ARGUMENT

The Court in this case is faced with the proper interpretation of the FLSA in the context of an agency relationship. Specifically, the Court must decide whether the "gross volume of sales made or business done" is what is sold by the agent (his services) or whether it is the total receipts it collects from the rentals of another's apartment.

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[20] App. 48-50. The exception is Robin Hood Apartments at which all employees were paid according to the FLSA.

[21] App. 50, (calculated by taking 6% of the rentals collected by Drucker & Falk employees and 4% of the rentals collected by the owners' employees.

Petitioner's position is that Section 3(s) and the Congressional history require one look to the sales of Petitioners. These sales are represented by the gross commissions they receive for the sale of their services to the apartment owner. To link the agent's sales to the total funds he handles for the true owner through an in and out special bank account would fly in the face of the congressional intent to measure the agent's impact on commerce.

The other issue which the Court must resolve is whether under Sections 6 and 7 of the FLSA the managing agent of an apartment complex employs the maintenance workers. It is the Petitioners' position that the maintenance workers are employees of the owner, not the agent.

The mere fact that Drucker & Falk may meet the statutory definition of employer within the meaning of Section 3(d) of the Act is not dispositive of the issue. The question is whether Sections 6 & 7 also require that (1) the employees be those of the employer and (2) whether those sections also require that the employer employ those employees. Petitioner urges that the statute and the decided case law demand those questions be answered.

Drucker & Falk's position is that whatever it does for the apartment owner, it does as an agent. The maintenance workers are not the employees of Drucker & Falk, but rather those of the owner. The established test in the determination of whose employees are the maintenance workers, is who "as a matter of economic realty are dependent upon the business to which they render service." *Bartels* v. *Birmingham, infra.* In the factual context of this case, it is clear that the maintenance employees are an integral and necessary part of the owner's business of maintaining its property. Drucker & Falk's business is one of lending its expertise in the supervision of that labor.

Accordingly, the Court must conclude that the fair measure of sales made or business done of Drucker & Falk are the gross commissions it receives for the services it sells. Likewise, the Court must conclude that the maintenance workers are those of the owner and employed by him.

ARGUMENT

I.

Petitioners Are Not An Enterprise Since The Specified Gross Annual Volume Of Sales Made Or Business Done Is Measured By Gross Commissions, Not Gross Rentals

The FLSA, as amended in 1966, provided the following definition of an enterprise in Section 3(s):

> Enterprise engaged in commerce on the production of goods for commerce means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which (1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000.00 (exclusive of excise taxes at the retail level which are separately stated . . .)

Sale is defined in the Act to include "any sale, exchange, contract to sell, consignment for sale, or other disposition. (Section 3(k))

The government takes the position that gross rentals rather than gross commissions are to be the measure of the "gross volume of sales made or business done" under the 1966 amendments with, for purposes of this case, its $500,000 minimum requirement. Your Petitioners position is that the statutory language and the congressional intent is designed

to measure Drucker & Falk's gross business and this can only be measured by their gross commissions.

Three dollar-size provisions were placed into the act as an "economic test." The Senate Report No. 145, 89th Cong., 2nd Sess., elaborated on the point as follows:

> "(The million dollar test) . . . is the line which the Congress must draw in determining who shall and who shall not be covered by a minimum wage. It is a way of saying that anyone who is operating a business of that size in commerce can afford to pay his employees the minimum wage under this law." 1961 *U.S. Code Cong. & Ad. News,* p. 1624.

So it is clear the intention of the "dollar-test" was to measure the size of the business of the "enterprise" in question. How should that size be measured? Obviously by the actual funds received by the "enterprise" for its own purposes, not by the mere fact that, as agent, the petitioners act as a conduit for receipts it does not own.

Drucker & Falk's position is confirmed by the statutory language.

> . . . An enterprise *whose* annual gross volume of sales made or business done is not less than $500,000. . . . (Section 203(r), emphasis added.)

Thus, Congress required that one look to the enterprise's gross volume of sales. It is difficult to see how gross rentals are Drucker & Falk's gross volume of sales. The cases which have discussed the subject of "gross receipts" versus "gross commissions" show a split of authority on the issue. In *Schmidt* v. *Randall,* 160 F. Supp. 228 (D. Minn. 1958) the Court held that the inclusion of "gross receipts" rather than "commissions" only, in a case where defendant hotel handled the sale of tickets as an agent for Greyhound Lines, "would present an unrealistic picture of the defendant's business."

160 F. Supp. at 230. The Court held that only the commissions should be included. The *Schmidt* case relied in part on an identical holding in *Mitchell* v. *Carratt*, 160 F. Supp. 261 (S.D. Fla. 1956).

In the Fourth Circuit the government relied on *Wirtz* v. *Jernigan*, 405 F.2d 155 (5th Cir. 1968). But even accepting the *Jernigan* rationale and rejecting *Schmidt* and *Carratt* (which defendants urge would be "unrealistic" to do) means nothing as applied to the facts of the instant case. For *Jernigan* involved a situation where the owner of the "establishment" in question was involved. It was the owner's "gross sales" arising from his own establishment that was at issue.[32] The situation in the instant case of the gross business of an agent, working for the owner of the establishment, does not appear in any of the cases cited by the government, other than *Arnheim & Neely* v. *Hodgson*, 444 F.2d 609 (3rd Cir. 1971) and *Shultz* v. *Isaac T. Cook & Co.*, 314 F. Supp. 461 (E.D. Mo. 1970). The *Cook* and *Arnheim & Neely* cases are not persuasive because the courts relied (as did the Fourth Circuit in the instant case) on certain bank and insurance company cases where the defendant was the owner of the building in question.[33] The bank and insurance company decisions involved the question of whether the gross rentals of the building which the bank or insurance company owned should be included in the firm's gross volume of sales

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[32] It is interesting to note that the *Jernigan* Court implied that had it found that the defendant had a "mere custodial function," the ruling would have been different. (405 F.2d at 159) The District Court in this case found that Drucker & Falk had a "mere custodial function" when it said, "The sums to be distributed from said collections are controlled by the owner." (312 F.Supp. 608, 612-13 (1970))

[33] *Wirtz* v. *Savannah Bank & Trust Company*, 362 F.2d 857 (5th Cir. 1966); *Wirtz* v. *First National Bank and Trust Company*, 365 F.2d 641, (10th Cir. 1966) *Wirtz* v. *Columbian Mutual Life Insurance Company*, 380 F.2d 903 (6th Cir. 1967).

or business done. The courts in each of those cases held that the rental income was part of the bank's or insurance company's enterprise and thus, quite properly included those sums in computing the gross volume of business done. But, it is quite different to say the same where one is attempting to determine the gross business of an agent of the building owner when the agent is a mere conduit for the gross rentals. This distinction is basic to the determination in this case.

Irrespective of whether or not Drucker & Falk is an "employer" of these "employees," within the meaning of the Act, there can be no doubt that the rentals received by Drucker & Falk do not belong to anyone other than the owners of the buildings in question. By the same token, the insurance premiums received by Drucker & Falk in its insurance department do not belong to anyone other than the insurance company. Commissions received on these insurance premiums will be reflected, along with all other commissions, including rental commissions, in the annual statement of the company. It would be unthinkable that the gross business of someone else be included in the amount of business transacted. The gross rentals collected are no more a measure of Drucker & Falk's business size, than is the volume of loans, which may be handled by a law firm, or the total deposits of a bank, or the total receipts of a brokerage firm. As the District Court so aptly said below:

> Since the volume of business is one of the tests of whether a business is within the Act, it is difficult to believe Congress intended the measure of the size of the business to be the sum which passed through the business. That is, the total deposits of a bank, as opposed to its gross income; the total receipts of a brokerage firm from sale of properties of others on commission as opposed to the gross sum from sale of its services, its commissions; the total amount of a loan closed as opposed to the lawyer's gross fee; the sales price of real

> estate sold by a real estate agent or broker as opposed to his commissions. A real estate firm might act as agent for the sale of one parcel of land at a sales price of one million dollars in a year, with few other sales. Under the government's view, such a business, if the other requirements of the Act were met, would come within the Act.
>
> The "gross volume of sales made or business done" is what is sold by the Agent, his services. He cannot sell for himself what is not his. What he sells of the owners he sells for the owners as the owners' agent. This then is the owners' sale. The owner corporation can only act through agents. 312 F. Supp. 608, 612-13 (1970)

The conclusion, therefore, must be that the gross rentals collected by the defendants on behalf of the respective owners of the buildings which it manages cannot be a proper measure of the "sales made" or the "business done" of Drucker & Falk. A contrary holding would present an unrealistic picture of the defendant's business and deviate from the congressional intention to cover businesses in an economically realistic manner.

II.

The Maintenance Workers Employed At The Various Apartment Projects Managed By The Petitioners Are Employees Of The Owner, Not Of Drucker & Falk

A. The Result Of The Conclusion Which The Government Urges Would Be To Overrule Maryland v. Wirtz, *Disregard The Congressional Intent Of Not Extending The FLSA To Small Local Businesses, Sanction Fleeting Coverage And Turn On Its Head The Axiom That An Agent Can Rise No Higher Than Its Principal.*

In working through the definitions in the FLSA one, at first blush, concludes the Government is correct. The Secre-

tary argues that Sections 6 and 7 require every employer to pay the appropriate standards to each of his employees in an enterprise engaged in commerce. Since Section 3(d) defines employer very broadly, i.e., "any person acting directly or indirectly in the interest of an employer in relation to an employee," Drucker & Falk is at least acting indirectly in the interest of an employer (the owner). The argument continues that once it is found that Drucker & Falk is an employer, the rest flows naturally, for then they must pay their employees (i.e. those "employed by an employer") who are employed in an enterprise.

Yet the results of that reasoning fly in the face of a Supreme Court decision, clear congressional intent and an established legal axiom. As this Court pointed out in *Maryland* v. *Wirtz*, 392 U.S. 183,188, (1968), with regard to the 1961 and 1966 Amendments establishing the enterprise concept:

> The effect of the . . . (enterprise amendments) was to extend protection to the fellow employees of any employee who would have been protected by the original Act, but not enlarge the class of *employers* subject to the Act. (Italics in original.)

It is clear that the adoption of the "enterprise" amendments in 1961 did not enlarge the class of employers covered by the Act. Thus, if the defendants were not covered by the Act before 1961, they were not covered after 1961. The Secretary admits (App. 48) that before the 1966 enterprise amendments there were grave doubts as to the applicability of the Act to apartment house management companies. However, the Secretary implies that bolstered by the 1966 amendments it asserted its position that the Act covered activities like those of Drucker & Falk. (App. 48) Respectfully, your Petitioners submit, based on *Maryland* v. *Wirtz*,

supra, that the Department of Labor misconstrued the effect of the 1966 amendments as enlarging the class of employers, when, in fact, it was designed to enlarge the class of employees.

The statement cited above in *Maryland* v. *Wirtz* merely said what is perfectly clear from the legislative history. The purpose of the enterprise amendments could not be clearer.

> In general, the definition of such an enterprise (in section 3(s) of the Act) is based on annual dollar volumes of business and types of businesses. Under this category of coverage all the employees of such an enterprise will be covered by the Act, regardless of the relationship of their individual duties to commerce or the production of goods for commerce. Where a business does not fit into the definition of such an enterprise, certain individual employees of such business may, nonetheless, be covered if they qualify under the test of coverage established in 1938. (House Report No. 871, 89th Cong., 1st Sess., pp. 7-8; House Report No. 1366, 89th Cong., 2nd Sess., p. 9.)

In a similar vein, the Senate noted in its report on the 1961 Amendments:

> The bill also contains provisions which should insure that a small local independent business not in itself large enough to come within the new coverage, will not become subject to the act by being considered a part of a large enterprise with which it has business dealings. (Senate Report No. 145, 89th Cong., 2nd Sess.; *1961 U. S. Code Cong. & Admin. News* 1620, 1660.)

Not only does the Government's theory seek to expand the coverage of the FLSA where it was not intended, it also makes that coverage illusory. For example, coverage will depend solely on the existence of Drucker & Falk as the managing agent. Should the owner not like the finding of

the Court in this case and decides to discharge Drucker & Falk and undertake to do his own managing, there will be no coverage. Nothing has changed as far as the employee is concerned: he does the same work at the same place. It is almost specious to talk about Drucker & Falk's "impact on commerce" when the reality is that it is the *owner's* determination to hire or fire Drucker & Falk which makes the impact on commerce.

The element which the government consistently ignores is that Drucker & Falk is an agent. Of that there can be no question. Under our law it is axiomatic that an agent can rise no higher than his principal. However, if the Government's logic is accepted, he does. Congress never intended that the activities of an agent should shape the status of the employer.

If these results follow from the Government's argument, and they do, where is the misinterpretation of the law? We believe it lies in the Government's premise that once it is determined Drucker & Falk is an employer within the meaning of Section 3(d), they are obligated to pay under Sections 6 and 7. The assumptions that (1) Drucker & Falk acts as an "employer *in relation to an* employee" within the meaning of Section 3(d); (2) the maintenance employees are Drucker & Falk's as required by Section 6 and 7; and (3) the maintenance employees are employed by Drucker & Falk in an enterprise as required by Sections 6 and 7 are not supported by the facts, the law, or logic.

B. Petitioners, As An Agent, Do Not Act As An Employer In Relation To An Employee *Within The Meaning Of Section 3(d).*

Employer as defined in Section 3(d) "includes any person acting directly or indirectly in the interest of an employer *in relation to an employee.*" (Emphasis supplied) Drucker

& Falk contends that the owner of the project is the employer within the meaning of the FLSA. Your petitioners admit that they act "indirectly in the interest of an employer" (owner). That, they are required to do under their agency contract.

However, Drucker & Falk deny that they act as an employer "in relation to an employee." This is so because an employee is an "individual employed by an employer." (Section 3(e)) Drucker & Falk does not employ the maintenance men at the various projects. They merely supervise that activity on behalf of the project owner.

The well-reasoned case of *McComb* v. *McKay,* 164 F.2d 40 (8th Cir. 1947) is one of the many cases which support this distinction. The issue there was whether supervisors (McKays) were independent contractors for a railroad in their efforts to make, repair and store temporary grain and coal doors at a site maintained by the railroad. The Eighth Circuit observed:

> If the McKays represent the railroad in employing men and supervising the operations of the grain door yard, as the District Court determined, the men are not in any proper sense employees of the McKays, but are employees of the railroad . . . (*Id.* at 49)

The facts of the instant case support this reasoning. Drucker & Falk are agents of the owners—like the McKays, they represent the owners "in employing men and supervising the operations." The Court will recall that the management of each project is carried out by a project manager or superintendant, who is fairly autonomous. At best, this is the only individual to which Drucker & Falk acts as an employer *in relation to an employee,* and that individual is not an employee of Drucker & Falk.

C. The Maintenance Employees Are Employees Of And Employed By The Project Owners And Are Not Employed By Drucker & Falk In Its Enterprise Within The Meaning Of Sections 6(b) And 7(a) (2)

The definition of employer in the FLSA is a legal fiction, especially as it applies to an agent as in the case at bar. Under the common law standards an employer could not be a person acting indirectly for an employer. Otherwise, the track foreman at the C & O Railroad, directly supervising hundreds of men, would have liability under the FLSA. More pointedly, perhaps, is the possibility under the Act that each justice of this Court would be responsible for the wages of his clerk. Yet, the government would urge that the FLSA adopts such a standard.[34]

However, Congress in determining in Sections 6 and 7 who shall pay certain standards and to whom adopted language which avoided this result. Sections 6 and 7 require NOT that every employer shall pay to each employee a certain standard,[35] but rather that "every employer shall pay to each of *his* employees" a certain standard.

Thus, in a nutshell we are saying this: You must look to Sections 6 and 7 to see who is obligated to pay the standard. Those sections say that an employer is obligated to pay those standards. An employer may be one who acts indirectly. The next question one asks is who is the employer obligated to pay. The Act says *his* employees. His employees cannot properly be interpreted to mean those employees to whom he acts only as agent for the true employer.

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[34] As this Court pointed out in *Walling* v. *Portland Terminal Co.*, 330 U.S. 148, 150 (1947): This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category.

[35] This language would be consistent with the legal fiction of the employer definition in 3(d) and the employee definition in 3(e).

The same argument with regard to the importance of the word "his" can be made with regard to meaning of the word "employ" in Sections 6 and 7. Those sections require every employer to pay to each "of his employees . . . who is employed in an enterprise engaged in commerce." The maintenance employees are not *employed* in or by Drucker & Falk's enterprise.[36] While employ is defined in 3(g) as "to suffer or permit to work" this cannot mean that an employee hired by a principal's agent, the product of his labor primarily being used for the benefit of the principal, is employed or is "suffered or permitted to work" by the agent. *Cf. Maddox* v. *Jones,* 42 F. Supp. 35, (N.D. Ala. 1941).

Put yet another way, all your petitioners are saying is that it is one thing to determine whether a party comes within the Acts broad definition of "employer"; it is quite another to determine whose business employs the employee. *McComb* v. *McKay,* op. cit.; *Hodgson* v. *Royal Crown Bottling Co., Inc.,* 324 F. Supp. 342, 356, 357, (N.D. Miss. 1970); *Shultz* v. *Isaac T. Cook Co.,* 314 F. Supp. 461, F.2d 609 (3rd Cir. 1971); *Cf. Walling* v. *Portland Terminal Co.,* op. cit.; *United States* v. *Rosenwasser,* 323 U.S. 360 (1945); *Williams* v. *Jacksonville Terminal Co.,* 315 U.S. 386 (1940); *United States* v. *Silk,* 331 U.S. 704 (1947); *Rutherford Food Corp.* v. *McComb,* 331 U.S. 722 (1947).

D. As A Matter Of Economic Reality, The Maintenance Workers Are Employees of The Project Owner, Not Drucker & Falk.

Thus, the inquiry does not end merely because an individual may meet the statutory definition of an employer. One must still determine whether the maintenance employees are those of Drucker & Falk or those of the owner.

[36] Assuming the existence of an enterprise.

In making this determination, this Court in *Bartels* v. *Birmingham*, 332 U.S. 126, 130 (1947) characterized the appropriate inquiry as follows:

> "... [I]n the application of social legislation employees are those who as a matter of *economic reality* are dependent upon the business to which they render service."

And in viewing these facts can there be any doubt as to whose business the employees are dependent as a matter of economic reality.

In the case at bar, it is quickly seen that the employees are an integral and necessary part of the owner's business, maintaining its property. The defendants do not run a janitorial "Kelly Girl" service. They are in the business of selling their expertise and supervision to apartment projects for a commission of the rentals. (App. 40) The owners request Drucker & Falk to undertake the supervision of the maintenance of the property (App. 40), for the maintenance of the physical property is an integral and fundamental part of the owner's asset. Managing agents may come and go, but the employees stay. (App. 56)

Another economic reality points to the owner as the employer as opposed to Drucker & Falk. The most basic economic fact—who pays the employee—Stipulation 3(d) clearly states that this is the owners of each apartment building. (App. 44) In point of fact, the defendants have absolutely no obligation to pay the employee. If the apartment project does not generate the income to meet the overhead, payment of salaries are the owners' obligation. (App. 52, 59)[37]

[37] The Government may seek to gain mileage out of the fact that the employees are paid by Drucker & Falk check (App. 43), but on whose check or over whose signature payment is made has no economic reality.

The third most fundamental economic fact, who sets the amount of the wage, again demonstrates the defendants are not the employers. The owners, not the defendants, set the wage. Each year the owners approve a budget which places specific allowances for maintenance costs such as payroll (App. 45) and the wage scale is effectively bound by the limits of the budget. It should be underscored that as a practical matter, Drucker & Falk has little or nothing to do with the setting of wages even within the budget. (App. 45) This is the job of the superintendent, who works on the premises and reviews the budget with the owners. (App. 45)

Another economic fact is the employee's allegiance, i.e., for whom does the employee feel he's working. Again the facts demonstrate the employer is the owner of the project. Stipulation 4(d) tells us (1) that the employees of the various apartment complexes stay with the owners, not the managing agents, and (2) that even if offered a job with Drucker & Falk the employee feels his allegiance to the owner, not to the defendants. (App. 46)

What is obvious then, is that all the parties to the arrangement, the owner, Drucker & Falk and the employees considered the project employees in the employment of the owners, not Drucker & Falk. In close cases the view taken by the parties of their relationship is particularly relevant. *Illinois Tri-Seal Products, Inc.* v. *United States,* 353 F.2d 216, 218 (Ct. Cl. 1965).

The contract between the owner and Drucker & Falk specifically provided that "employees required for the operation and maintenance of the premises . . . (are) . . . deemed employees of the owners." (App. 53, 60) While the label the parties place upon the relationship is not controlling, this agreement, along with the control by the owners as to sala-

ries (App. 45), as to location of employment (App. 48) and as to loyalty of the employees (App. 46), is indicative of the view of the parties. This is particularly true when it is understood that clerical personnel, who by contract are Drucker & Falk employees, were paid the minimum wage, and thus, not covered by this lawsuit. (App. 42)

The last economic reality of an employer, i.e., the common law tests of the right to hire, fire and direct the activities of the employees, is perhaps met by Drucker & Falk. Yet, the exercise of these rights are directed primarily only to one individual, the Project Manager, and then only as agent for the owner.

This failure of the government to face the economic reality of the relationship leads it astray in its analysis. The cases which it relied on below such as *Greenberg* v. *Arsenal Bldg. Corp.* 50 F. Supp. 700 (S.D.N.Y. 1943), aff'd 144 F.2d 292 (2nd Cir. 1944), rev'd in part on other grounds *sub nom Brooklyn Bank* v. *O'Neill,* 324 U.S. 697 (1945), *Asselta* v. *149 Madison Avenue Corp.*. 65 F. Supp. 385 385 (S.D.N.Y. 1945), aff'd 156 F.2d 139 (2nd Cir. 1946), *McComb* v. *Homeworkers' Handicraft Corp.,* 176 F.2d 633 (4th Cir. 1949) and *Southern Ry. Co.* v. *Black,* 127 F.2d 280 (4th Cir. 1942), etc., etc., were clearly correct. In each of these cases, while not identifying the five economic realities outlined above, the courts found at least four of these elements. In the instant case, only the common law test can be found. In the Senate Report No. 1487, 2 *U.S. Cong. and Admin. News* (1966), page 3029, the Senate Committee underscored this interpretation by saying that the "total situation controls." When the total situation is reviewed, it is clear that whatever functions Drucker & Falk carry out are done so as agents for the owner of the project.

Further, it is clear that the services which the employees perform are an integral part of the owner's business, not

Drucker & Falk's. Accordingly, one ought to conclude that the maintenance men at the apartment project are employed by the owner and in the owner's enterprise within the meaning of Sections 6 and 7 of the FLSA.

CONCLUSION

The judgment of the court of appeals should be reversed and the judgment of the district court reinstated.

Respectfully submitted,

Franklin O. Blechman
Herbert V. Kelly
E. D. David
Of Counsel

JONES, BLECHMAN, WOLTZ & KELLY
2600 Washington Avenue, Seventh Floor
Newport News, Virginia 23207
Counsel for Petitioners